NOV 8 1994
OFFICE OF THE CLERK

No. 94-226

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART McHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

LARRY S. STEWART, ESQ.
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President,
The Association of Trial Lawyers of America

JEFFREY ROBERT WHITE, ESQ.*
CHERYL FLAX-DAVIDSON, ESQ.
1050 31st. St., N.W.
Washington, DC 20007
(202) 965-3500
Attorneys for Amicus Curiae
**Counsel of Record*

BEST AVAILABLE COPY

22pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICUS CURIAE*..... *1*

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. FLORIDA RULE 4-7.4(B) IS A CONSTITUTIONAL RESTRICTION ON COMMERCIAL SPEECH. 4

A. The States May Regulate Attorney Commercial Speech in Furtherance of a Substantial State Interest. 4

B. Florida's Rule Strikes a Reasonable Balance Between the State's Interest in Regulating Attorney Commercial Speech and the Scope of the Restriction. 7

1. Florida's Rule Serves Substantial State Interests in Preserving the Fairness of the Civil Justice System to Litigants. 7

2. Empirical Evidence Shows that the Challenged Regulation Advances Florida's Substantial Interests. 11

3. The Scope of the Regulation is in Proportion to the Interest Served. 14

II. THE 30-DAY MORATORIUM IS A REASONABLE TIME, PLACE, AND MANNER RESTRICTION..... 16

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705 (Tex. 1989) 10

Bates v. State Bar, 433 U.S. 350 (1977) 5

Board of Trustees v. Fox, 492 U.S. 469 (1989) 14

Borkoski v. Yost, 594 P.2d 688, 694 (Mont. 1979) 10, 11

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 7, 11, 14

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 16

Doe v. Hafen, 772 P.2d 456 (Utah App. 1989) 11

Edenfield v. Fane, 113 S. Ct. 1792 (1993) 7, 11

In re R.M.J., 455 U.S. 191 (1982) 5

McHenry v. The Florida Bar, 21 F.3d 1038 (11th Cir. 1994) 4, 14, 16

New York Public Interest Research Group, Inc. v. Insurance Information Inst., 531 N.Y.S.2d 1002 (Sup. Ct. 1988) .. 10

Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978) 6, 7, 15

Quinn v. Aetna Life and Cas. Co., 409 N.Y.S.2d 473 (Sup. Ct. 1978) 9

Shapero v. Kentucky Bar Assoc., 486 U.S. 464 (1988) 4, 6

Ward v. Rock Against Racism, 491 U.S. 78 (1989) 16

Zauderer v. Office of Disciplinary Council, 471 U.S. 626 (1985) 5, 11

Other Authorities

Academy of Florida Trial Lawyers' Comments in Support of Proposed Florida Bar Regulations on Attorney Advertising 11, 12, 13

ABA Code of Professional Responsibility (1976) 5

Frank N. Magid Associates, "Attitudes & Opinions of Florida Adults Toward Direct Mail Advertising by Attorneys" (Dec. 1987) (the "Survey") 11

Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 Am. U.L. Rev. 1637 (1993) 9

Stephen Daniels and Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1 (Oct. 1990) 8

John DeWitt, *Report of Findings: Nevada lawyers' Advertising Survey*, 55 Inter Alia 11 (Apr. 1990) 13

Theodore Eisenberg and James A. Henderson, *Inside the Quiet Revolution in Products Liability*, 39 U.C.L.A. L. Rev. 731 (1992) 9

Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 Ga. L. Rev. 633 (1994) 8

Mark Galanter, *News From Nowhere*, 71 Denv. L. Rev. 101 (1993) 8

Valerie Hans, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 Law and Soc'y Rev. 85 (1992)..... 10

James A. Henderson and Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 U.C.L.A.L. Rev. 479 (1990) 9

Elizabeth Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A.J. 68 (Jan. 1979)..... 10

Stephanie M. Myers, Allan B. Padderud, and Anthony J. Ferri, *A Survey of Jurors' Attitudes Toward Attorney Advertising*, 56 Inter Alia 11 (July, 1991)..... 13, 14

Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort System -- And Why Not?*, 104 U. Pa. L. Rev. 1147 (1992) 9

Tort Reformers Say Advertising Pays, Even in Texas, Liability Week, Feb. 10, 1992..... 10

John W. Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*,, 24 Houston L. Rev. 81 (1987)..... 9

Richard Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141 (1988)..... 9

IN THE

Supreme Court of the United States

October Term, 1994

No. 94-226

THE FLORIDA BAR,
Petitioner,

v.

G. STEWART McHENRY, WENT FOR IT, INC.
and JOHN T. BLAKELY,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in support of petitioner The Florida Bar. Letters from both parties granting consent to the filing of this brief have been filed with this Court.

ATLA is a voluntary national bar association whose approximately 60,000 trial lawyers primarily represent injured plaintiffs in civil actions. For this reason, ATLA members are vitally interested in assuring that those who have been injured in accidents or disasters have access to information concerning the availability of legal services. However, injured plaintiffs depend upon the integrity of the judicial process, particularly the impartiality of jurors, for a fair and just adjudication of their legal claims. For this reason, ATLA is also concerned that the means of soliciting clients by attorneys not undermine that integrity and impartiality.

In ATLA's view, certain types of solicitation engender cynicism with respect to the public's estimation not only of the legal profession, but also the civil justice system and the credibility of plaintiffs who pursue civil claims. These members of the public sit as jurors in personal injury and wrongful death cases.

ATLA has therefore supported efforts by the bar to regulate attorney solicitation of clients in a manner which reduces the potential harm of some typed of solicitation without depriving the public of valuable information.

SUMMARY OF THE ARGUMENT

If lawyers sold cars, or computers or corn futures, this would not be a troublesome case. This Court has extended First Amendment protection to commercial speech, including the advertising of prices and availability of routine legal services. But this Court has also consistently reaffirmed the authority of the states to regulate commercial speech by attorneys. Moreover, the Court has recognized that solicitation by attorneys implicates important state interests.

This Court has held that a state may regulate commercial speech in furtherance of a substantial state interest, by means which advance that interest in a direct and material way, and where the restriction on protected speech is a reasonable "fit" in proportion to the interests served.

Preserving the integrity of the judicial system and the impartiality of jurors are clearly substantial state interests. Experience with advertisements by advocates of "tort reform" demonstrates that adverse public perceptions of the civil justice system and of personal injury lawyers can taint the verdicts of jurors in personal injury cases. Bias and skepticism against personal injury plaintiffs on the part of potential jurors may also be a result of negative reaction to unrestrained attorney solicitation of clients from among recent victims of accident or disaster. Preserving the right of litigants to a fair and impartial jury is clearly a substantial state interest.

Florida's 30-day ban on targeted direct mail solicitation of accident victims and their families materially advances this state interest. Empirical studies in both Florida and Nevada indicate that attorney advertising can have a negative impact on the public's regard for the judicial process. Data also suggests that negative attitudes toward attorneys who advertise may translate into a negative perception of the credibility of plaintiffs who bring injury claims.

The Florida ban is also narrowly tailored to serve this state interest. Based on its investigation and study, the Bar fashioned a rule that affects a particular type of solicitation in a particular circumstance. It does not shut off the flow of information to the public and is limited to a relatively short time period.

Even if targeted direct mail solicitation were fully protected speech, the First Amendment permits the state to enforce reasonable, content-neutral limitations on time and

manner. The Florida ban does not look to the content of the solicitations. Moreover, its limitation on solicitation of accident victims for 30 days is reasonable.

ARGUMENT

I. FLORIDA RULE 4-7.4(B) IS A CONSTITUTIONAL RESTRICTION ON COMMERCIAL SPEECH.

A. The States May Regulate Attorney Commercial Speech in Furtherance of a Substantial State Interest.

At issue before this Court is Florida Rule 4-7.4(b), which establishes a 30-day moratorium on attorneys' use of targeted direct mail to solicit clients in actions for personal injury or wrongful death. The lower court felt constrained by this Court's decision in *Shapero v. Kentucky Bar Assoc.*, 486 U.S. 464 (1988), to hold that the Rule violates the First Amendment. *McHenry v. The Florida Bar*, 21 F.3d 1038, 1043 (11th Cir. 1994). Amicus respectfully disagrees.

In *Shapero*, this Court was not presented with a narrowly drawn regulation, but with a blanket ban on targeted direct mail solicitation by attorneys. The asserted state interests served by the ban were not supported by empirical data. Nor did *Shapero* address the concern that unrestrained solicitation by attorneys might prejudice potential jurors against plaintiffs seeking legal redress for injury. Because these distinguishing factors are present in the case at bar, Amicus submits that Florida's regulation is consistent with this Court's First Amendment precedents.

Although this Court has struck down a number of blanket prohibitions of commercial speech by attorneys, the Court has never indicated that the States may not regulate such speech by carefully drawn regulations. Indeed, in nearly every

decision, the Court explicitly reserved to the States the authority to do precisely that.

This Court extended First Amendment protection to attorney advertising as commercial speech in *Bates v. State Bar*, 433 U.S. 350, 364 (1977). Although the Court struck down a blanket prohibition of advertising of prices for routine legal services, Justice Blackmun, speaking for the majority, emphasized "we, of course, do not hold that advertising by attorneys may not be regulated in any way." *Id.* at 383-84. Indeed, "allowing restrained advertising would be in accord with the bar's obligation 'to facilitate the intelligent selection of lawyers, and to assist in making legal services fully available.'" *Id.* at 377, quoting ABA Code of Professional Responsibility E-C 2-1 (1976).

In re R.M.J., 455 U.S. 191 (1982), invalidated a blanket prohibition against advertising which deviated from an approved list of permissible content. However, the Court pointedly advised that "when the particular content or method of advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions." *Id.* at 203. The Court took pains to make clear that the States retain authority in this area:

> We emphasize, as we have throughout our opinion that States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions.

R.M.J. at 207.

By the time the Court decided *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626 (1985), Justice White was confident in stating that under the "well settled" approach

of this Court, "blanket bans" on attorney advertising are impermissible, while "rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible." *Id.* at 638.

Similarly, *Shapero* ruled that "merely because targeted, direct-mail solicitation presents lawyers with an opportunity for isolated abuses or mistakes does not justify a *total ban* on that mode of protected commercial speech." *Shapero* at 476 (emphasis added). Nevertheless, the "State can regulate such abuses and minimize mistakes through far less restrictive and more precise means." *Id.*

One situation in which the Court has upheld a ban is that of in-person solicitation of clients. *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 (1978). The Court explicitly recognized that personal injury victims are especially vulnerable.

> [T]he potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence. Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive.

Id. at 465.

Amicus suggests that these concerns are also present, if to a lesser degree, where the solicitation takes the form of a personalized letter targeted to an injured person shortly after the accident or disaster. In such circumstances, "the State has a strong interest in adopting and enforcing rules of conduct

designed to protect the public from the harmful solicitation by lawyers whom it has licensed." *Id.* at 464.

In determining whether a state's regulation is consistent with the limited First Amendment protection accorded commercial speech, this Court has invariably looked to the balancing test it formulated in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980). That test looks to the state's interest in restricting speech, whether the regulation advances that interest, and whether the restriction is sufficiently narrow. Amicus submits that the Florida rule passes muster under that test.

B. Florida's Rule Strikes a Reasonable Balance Between the State's Interest in Regulating Attorney Commercial Speech and the Scope of the Restriction.

The Court recently applied the *Central Hudson* test in *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) to Florida's ban on telephone solicitation by Certified Public Accountants. Justice Kennedy described the Court's inquiry:

> [U]nder the test set forth in *Central Hudson* we must ask whether the State's interests in proscribing [the solicitation] are substantial; whether the challenged regulation advances these interests in a direct and material way; and whether the extent of the restriction on protected speech is in reasonable proportion to the interests served.

Id. at 1798.

1. Florida's Rule Serves Substantial State Interests in Preserving the Fairness of the Civil Justice System to Litigants.

The Florida Bar asserts that its 30-day moratorium on attorney targeted direct-mail solicitation (1) protects persons

traumatized by recent injury to themselves or family members from overreaching or undue influence by attorneys during the period of greatest vulnerability, and (2) protects the personal privacy and tranquility of recently injured persons or their loved ones. See Brief of Petitioner.

Amicus agrees that these are substantial State interests. However, Amicus seeks to direct the Court's attention to an additional consideration that informed the Florida Bar's regulation: The danger that adverse perception of personal injury attorneys engendered by unrestrained solicitation of clients may prejudice injured plaintiffs in the eyes of potential jurors.

Ethical Rule 4-7.4(b) is specifically directed at attorney solicitation of clients in personal injury or wrongful death cases. It is not news that the torts system has become the subject of an intense lobbying and public relations campaign by the liability insurance industry and corporate interests who seek to diminish the right to compensation for wrongful injury. Advocates of such "tort reform" claim that the civil justice system is in a "crisis." Often these attacks blame "greedy" trial lawyers stirring up litigation. *See generally*, Mark Galanter, *News From Nowhere*, 71 Denv. L. Rev. 101 (1993)(critical examination of the claim that an oversupply of lawyers is the cause of litigation). Indeed, the former President and Vice President of the United States made attacks on trial lawyers an important part of their campaign for reelection in 1992. Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 Ga. L. Rev. 633, 652 (1994)(quoting George Bush and Dan Quayle).

The tort reform lobbying effort has been sharply criticized by scholars as an exercise in "public relations, propaganda, and the mobilization of prejudice and fear," Stephen Daniels and Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 13 (Oct. 1990); an

example of "raw interest group politics" employing "smokescreens and false alarms," Richard Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141, 1148 & 1164 (1988); as well as "intentional misrepresentation," John W. Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 Houston L. Rev. 81, 96 (1987). *See especially*, Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 Am. U.L. Rev. 1637 (1993).

Empirical evidence overwhelmingly demonstrates that the claims of a litigation crisis are false. *See* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort System -- And Why Not?*, 104 U. Pa. L. Rev. 1147 (1992); James A. Henderson and Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 U.C.L.A.L. Rev. 479 (1990)

Nevertheless, a significant portion of the public has accepted them, primarily and directly as a result of the successful advertising and public relations effort of the "tort reform" advocates. Theodore Eisenberg and James A. Henderson, *Inside the Quiet Revolution in Products Liability*, 39 U.C.L.A. L. Rev. 731, 740 (1992). What is crucially relevant to this case is that these adverse perceptions of the civil justice system generally, and of trial lawyers in particular, *translate directly into juror bias against personal injury plaintiffs*. *Id.* at 791-95.

Courts have had to face this problem of tort reformers "poisoning the jury pool" through advertisements attacking the tort system. One court found that "the advertisements are geared toward influencing jurors and potential jurors in their decisionmaking process." *Quinn v. Aetna Life and Cas. Co.*, 409 N.Y.S.2d 473, 480 (Sup. Ct. 1978). Similarly, the Supreme Court of Montana found that "it is undeniable that

the purpose of the advertisements was to reduce the amount of damages awarded by a jury." *Borkoski v. Yost*, 594 P.2d 688, 695 (Mont. 1979). *See also Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 708 (Tex. 1989).

There is evidence that adverse public perception of the tort system does indeed translate into adverse perception of tort claimants. One court pointed out that the purpose of "lawsuit crisis" ads

> may well be to encourage readers and viewers, as potential jurors, to decrease plaintiffs' recoveries by awarding lower verdicts. Voir dire of jurors in civil cases now frequently includes questions directed to this advertising campaign, and *a large number of potential jurors indicate both that they are aware of and influenced by the advertisements.*

New York Public Interest Research Group, Inc. v. Insurance Information Institute, 531 N.Y.S.2d 1002, 1012 & n.12 (Sup. Ct. 1988)(emphasis added).

Empirical research into the impact of such advertising found that "even a single exposure to one of these ads can dramatically lower the amount of award a juror is willing to give." Elizabeth Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A.J. 68, 69 (Jan. 1979). *See also*, Valerie Hans, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 Law and Soc'y Rev. 85, 109 (1992)(anti-plaintiff attitudes among surveyed tort jurors associated with tort reform campaign); *Tort Reformers Say Advertising Pays, Even in Texas*, Liability Week, Feb. 10, 1992, at 1.

Advertising which has such a prejudicial effect on potential jurors clearly implicates a substantial state interest:

> When insurance companies inject the issue of insurance into the consciousness of every potential juror through a high priced advertising campaign, as has been illustrated in this case, they threaten every plaintiff's right to an impartial jury.

Borkoski v. Yost, 594 P.2d 688, 694 (Mont. 1979). *Accord, Doe v. Hafen*, 772 P.2d 456, 458 (Utah App. 1989).

Amicus suggests that similar concerns are raised by adverse public reaction to attorney solicitation of clients from among recent victims of accidents or disasters. Experience with "tort reform" advertisements suggests that perception of trial lawyers as overly aggressive in obtaining clients may "rub off" on plaintiffs in the eyes of some jurors.

2. Empirical Evidence Shows that the Challenged Regulation Advances Florida's Substantial Interests.

The second prong of the *Central Hudson* test looks to whether the regulation materially advances the State's substantial interest. The State's burden to justify its restriction "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield* at 1800, citing *Zauderer* at 626. It is clear from *Edenfield* that the State can demonstrate the need for its restriction through studies or anecdotal evidence.

Prior to promulgating Rule 4-7.4(b), the Florida Bar undertook hearings in which the results of extensive evidence-gathering documented that unrestricted lawyer advertising had severely reduced public confidence in the administration of justice and, as a result, was undermining the foundation of the civil justice system. *See Academy of Florida Trial Lawyers' Comments in Support of Proposed Florida Bar*

Regulations on Attorney Advertising at 5. Armed with evidence that this perceived problem was, in fact, a real one, the Bar crafted a rule that was designed to minimize this harm yet offer the least interference with the "free flow of commercial information."

A report by the Academy of Florida Trial Lawyers noted that in a poll of state circuit court judges, 82.5% of Florida's circuit judges who responded felt that lawyer advertising had an impact on the public's confidence in the administration of justice and virtually all indicated that the impact had been negative. Academy of Florida Trial Lawyers, *Comments, supra,* at 5. In that same poll, 23% of the judges surveyed indicated that potential jurors, witnesses, or parties had expressed opinions concerning advertising by lawyers during a part of the trial. *Id.* at 8.

The Florida Bar also had before it a study entitled "Attitudes & Opinions of Florida Adults Toward Direct Mail Advertising by Attorneys" (the "Survey"), prepared for the Bar by Frank N. Magid Associates in December 1987. This study showed evidence that direct mail advertising may result in less positive attitudes toward the legal profession and the judicial process. For example, in the direct mail recipients' survey, respondents were asked to indicate if they thought there would be any chance that the fact they had received an advertisement or solicitation by mail from a lawyer would influence the way they felt about lawyers or the trial should they be asked to serve on a jury in a civil case. A majority (83%) said they would be impartial jurors. Still, 11% -- over one person on every 12-person jury, if randomly distributed -- admitted that receiving direct mail advertising from an attorney would influence the way they feel about the lawyers in the trial on which they served. Persons surveyed stated that they would be concerned about the competence and honesty of advertising attorneys and the legitimacy of the case.

Among direct mail recipients, more than a quarter (27%) claimed that their regard for the legal profession and the judicial process was "lower" as a result of receiving a direct mail advertisement or solicitation from an attorney. *Survey* at 11. "[P]erhaps the most serious concern uncovered in this research is that the receipt of direct mail advertising may influence the decisions of potential jurors." Florida Academy of Trial Lawyers, *Comments* at 11.

The danger posed by attorney solicitation to the impariality of the jury system was buttressed by a study commissioned by the Nevada Lawyers' Advertising Study Commission in January 1990. John DeWitt, *Report of Findings: Nevada lawyers' Advertising Survey*, 55 Inter Alia 11 (Apr. 1990). About 38% of respondents indicated that advertising they had seen or heard had affected their respect for the legal system in a negative way. The study also revealed that a substantial number of people said they would be affected as jurors if they recognized one of the lawyers in a trial from seeing or hearing that lawyer in a television or radio ad. While most, 73%, said they would not be affected, 15% said they would be affected unfavorably, and 2% said they would be affected favorably. Most disturbingly, 8% -- nearly one person in twelve -- stated that their actual decision as jurors would be affected by the attorney's advertising. *Id.* at 17.

A subsequent study of attitudes toward attorney advertising held by jurors serving in personal injury and medical malpractice trials in Southern Nevada reinforces this finding. Stephanie M. Myers, Allan B. Padderud, and Anthony J. Ferri, *A Survey of Jurors' Attitudes Toward Attorney Advertising*, 56 Inter Alia 11 (July, 1991). While most jurors had positive attitudes toward attorneys, 63% held a negative view toward attorney advertising. *Id.* at 14. Jurors in cases where plaintiff's attorney advertised on television rated the plaintiff's evidence significantly lower than jurors in

cases where plaintiff's attorney did not. They also rated the defense lawyer's presentation and credibility significantly higher than jurors whose plaintiff's attorney was not a television advertiser. *Id.* at 15.

Amicus respectfully submits that this evidence indicates that Rule 4-7.4(b) would reduce at least one source of prejudice on the part of potential jurors against personal injury plaintiffs. The Rule thus directly and materially advances the State's substantial interest in affording a fair and impartial jury to civil litigants.

3. The Scope of the Regulation is in Proportion to the Interest Served.

In considering this final inquiry under *Central Hudson*, this Court must determine whether the regulation at issue constitutes a reasonable "fit" in light of the interest served by the state. *Board of Trustees v. Fox*, 492 U.S. 469 (1989).

Amicus argues that Florida's Rule is a reasonable means of regulating attorney commercial speech given the substantial interests at stake. The Eleventh Circuit recognized that the means chosen to advance the government interest in regulating commercial speech need only be

> a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.

21 F.3d at 1042, *citing Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

Amicus suggests this 30-day moratorium is carefully tailored to halt what the public might perceive as a particularly distasteful practice -- direct mail solicitation targeted to recently injured or bereaved persons -- without shutting off the flow of important information to those who may be in need of legal services.

The rule only prohibits such solicitation during a relatively short period of time during which victims are likely to be most vulnerable. It does not restrict other types of advertising or communication of information about available legal services.

More importantly, if such solicitation is subject to regulation at all, some lines must be drawn. For example, a mere 24-hour moratorium would clearly be reasonable, unless this Court is prepared to hold that any such moratorium is *per se* unconstitutional. Whether the restriction should be for one day or thirty or somewhere in between is a determination best left to the state bar, based on familiarity with conditions in the state as well as its own inquiry and factfinding with respect to the harms and benefits to the consumers of legal services there. [1]

Amicus submits that Ethics Rule 4-7.4(b) furthers a substantial state interest in preserving the fairness of the civil justice system and jury impartiality, that empirical evidence

---

[1] In response to the argument that within this 30-day period an individual is in the greatest need of legal counsel because of an onslaught of claims agents or adjusters of prospective defendants or their insurers attempting to solicit releases, Amicus strongly advocates that other professions similarly enact a 30-day moratorium. "Where lay agents or adjusters are involved, these practices for the most part fall outside the scope of regulation by the organized Bar; but releases or settlements so obtained [should be] viewed critically by the courts." *Ohralik v. Ohio State Bar*, 436 U.S. 459 n. 16.

shows that the Rule directly furthers that interest, and that it is reasonably proportional to the interest served. The Rule clearly satisfies the test enunciated by this Court in *Central Hudson*, and therefore comports with the First Amendment.

II. THE 30-DAY MORATORIUM IS A REASONABLE TIME, PLACE, AND MANNER RESTRICTION.

Even speech that is fully protected by the First Amendment is subject to valid time, place, and manner restriction. The lower court acknowledged that States may place restrictions on the time, place, and manner of constitutionally protected communication if they do so: (1) without regard to the content of the communication, (2) in a manner narrowly tailored to serve a significant governmental interest, and (3) leaving open alternative channels for communication. 21 F.3d at 1044, *citing Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

Contrary to the characterization by the lower court, Amicus suggests that Florida's moratorium on attorney solicitation is content-neutral. The operative factor under the rule is not the content of the solicitation letter but whether the recipient of the mailing or his or her relative was involved in an accident or disaster less than thirty days prior to the mailing. Rule 4-7.4(b).

"Government regulation of expressive activity is content-neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 78 (1989) (emphasis by Court). This is the case here. The Rule does not care what the attorney states in the solicitation letter; it is the very act of soliciting clients from among the recently injured or bereaved that the bar seeks to prevent.

Moreover, the Rule is narrowly tailored to apply only for a limited time during which injured persons may be most vulnerable, and it does not prevent attorneys from disseminating information to potential clients through the wide variety of other avenues of communication.

Amicus submits that a 30-day moratorium on targeted, direct mail solicitation of individuals known to have a specific legal problem is a narrowly drawn and reasonable means of advancing important state interests which does not absolutely restrict the free flow of information. By its Rule, Florida has struck a proper and delicate balance between access to important consumer information and the societal interest in protecting the public and safeguarding our jury system.

CONCLUSION

For the foregoing reasons, Amicus urges this Court reverse the decision of the lower court and hold Florida Rule 4-7.4(b) constitutional.

Respectfully submitted,

Jeffrey Robert White
Cheryl Flax-Davidson
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
Attorneys for Amicus Curiae

November 8, 1994